Supreme Court, U.S.
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Nos. 92-219 and 92-155

In The
# SUPREME COURT OF THE UNITED STATES
October Term, 1992

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CARROLL A. CAMPBELL, JR.,
GOVERNOR OF SOUTH CAROLINA
Appellant,

v.

NICK THEODORE, et al.,
Appellees,

LIBRARY
SUPREME COURT, U.S.
WASHINGTON

STATEWIDE REAPPORTIONMENT ADVISORY
COMMITTEE, et al.,
Appellants,

v.

NICK THEODORE, et al.
Appellees.

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**On Appeal From The United States District Court**
**For The District Of South Carolina**

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## BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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## EDITOR'S NOTE

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## I. Substantial Questions Are Presented.

In each separate Motion to Dismiss or Affirm filed in this case, the Appellees have underscored the substantial nature of the questions presented. Both the Appellants and the Appellees agree on the fundamental principles of law established by this Court which must guide a district court in fashioning its own legislative redistricting plans: none of the parties have questioned or challenged this Court's recognition that a lower federal court must meet "higher standards" in drafting redistricting plans than a legislative body. Chapman v. Meier, 420 U.S. 1, 26 (1975), and that, when devising and imposing a remedy, the lower court must "allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." Connor v. Finch, 431 U.S. 407, 425 (1977).[1] In addition, the Appellees have specifically recognized the duty of a

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[1] This admonition in Connor is intended to prompt a district court into settling all of the potential legal issues when it imposes its remedy, rather than engendering subsequent related cases which attack the original remedy. Connor is part of a consistent line of cases promulgated by this Court emphasizing the stricter standards for federal courts when redistricting a state, instead of the much less rigorous standards used to judge legislatively enacted plans. Roman v. Sincock, 377 U.S. 695, 710 (1964) (Court-ordered plans should be "free from any taint or arbitrariness or discrimination."); Connor v. Johnson, 402 U.S. 690, 692 (1971) ("[W]hen district courts are forced to fashion apportionment plans, single member districts are preferable . . .") Connor v. Williams, 404 U.S. 549, 550 (1972) (confirming the holding in Connor v. Johnson.) Chapman v. Meier, 420 U.S. 1, 26 (1975) ("A court-ordered plan must be held to a higher standard than at State's own plan.") Connor v. Finch applies these higher standards to minority vote dilution as well as the one person, one vote principle. 431 U.S. 407, 421-26 (1977).

federal district court to insure racial fairness in drawing a redistricting plan. See Motion to Dismiss or Affirm of Lieutenant Governor Nick Theodore at 18 ("The district court also should strive for racial fairness: the court-ordered plan must not be racially discriminatory in purpose or effect . . ."); Motion to Dismiss or Affirm of Speaker Robert J. Sheheen at 6 ("Section 2 of the Voting Rights Act prohibits the implementation of a redistricting plan that results in the dilution of minority voting strength.").

As to the facts, the parties agree that the court below was presented with alternative redistricting plans. Motion to Dismiss or Affirm of Lieutenant Governor Nick Theodore at 6; Motion to Dismiss or Affirm of Speaker Robert J. Sheheen at 22-23; Motion to Dismiss or Affirm of the South Carolina Senate at 11; Motion to Dismiss or Affirm of the Democratic Party of South Carolina at 7. For example, in contrast to the court's plan, one of the alternative Senate plans provided three more districts in which minority voters would have constituted a majority of the total population.[2] Similarly, one of the alternative State House plans created eight more minority districts than the court's plan.[3]

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[2] Governor Campbell and the Republican Party submitted separate Senate plans which provided for 13 and 14 districts, respectively, which had a majority black population; the court's plan contained only 11 such districts. See SRAC Jurisdictional Statement at 12. Even at this reduced number of districts, some of the court's districts will not result in the election of the candidates of choice of minority voters. See p. 8, infra.

[3] The alternative House plans submitted by the Governor and the Republican Party contained 35 and 36 districts respectively which had a majority black population; the court's plan contained

Finally, there is agreement among the parties that, in crafting its remedy, a district court must engage in a Section 2 remedial analysis. Motion to Dismiss or Affirm of Lieutenant Governor Nick Theodore at 22-23; Motion to Dismiss or Affirm of Speaker Robert J. Sheheen at 11; Motion to Dismiss or Affirm of the South Carolina Senate at 14; Motion to Dismiss or Affirm of the Democratic Party of South Carolina at 18. In this regard, the parties differ only as to the standard necessary to achieve racial fairness.

Despite these areas of agreement, the Appellees uniformly claim that no substantial question is now presented and that the court below applied the proper standards for court-drawn plans. The Appellees, however, seek support for this position by relying upon cases involving the less rigorous standards applied to legislatively drawn plans, not the higher standards required of federal courts.

The higher standards have been imposed on the district courts not only to prevent federal constitutional and statutory defects, but also in order to protect the judiciary's legitimacy by eliminating the possibility of reasonable charges of discriminatory or political arbitrariness. This Court has recently recognized the importance of protecting judicial credibility and legitimacy from such charges:

> The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands . . . The Court must take

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only 28 such districts. See SRAC Jurisdictional Statement at 15.

> care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.

Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 2814 (1992). See also Mitchell v. W.T. Grant, 416 U.S. 600, 636 (1974) (Stewart, J. dissenting). Thus, these higher standards are intended to protect courts from the appearance of politicization when venturing into the "political thicket."

The higher standards for the court-ordered plans require a district court to gather and analyze evidence under Section 2 of the Voting Rights Act. See Brooks v. Winter, 461 U.S. 921 (1983). This is a prudent and logical way to "allay suspicions" and prevent new constitutional challenges. Connor, 431 U.S. at 425. By substituting its own standards, the court below failed to meet the necessary requirements for court drawn plans. This failure raises substantial questions for review.

## II. The District Court Should Comply Fully With The Requirements Of Section 2 Of The Voting Rights Act.

As discussed in the Motion of Appellee State Senate, the court below neither rejected the applicability of Section 2 nor did it provide a complete Section 2 analysis. Motion to Dismiss or Affirm of the South Carolina Senate at 17. Such a position, lacking a structured approach to Section 2, invites careful examination of the relationship between Section 2 and court drawn plans.

In the present case, despite requests to the contrary, the court below failed to grant relief to cohesive minority communities. This error, if uncorrected, may be repeated by other lower courts, thus frustrating the intent of Congress to eliminate racial discrimination in voting.

Sufficient evidence of racial bloc voting was before the court below to conduct Section 2 remedial hearings. That the evidence was questioned does not mean that it was rebutted by direct evidence from the Appellees. It is now clear that questions concerning the proper tests and standards which should be used by a court in drafting a redistricting plan are subject to recurrence, as a brief historical review of South Carolina's redistricting process will reveal. See Graham v. State of South Carolina, Civil Action No. 3:84-1430-15 (D.S.C., July 31, 1984); South Carolina State Conf. of Branches of the NAACP v. Riley, 533 F. Supp. 1178 (D.S.C. 1982), aff'd, 459 U.S. 1025 (1982).

Contrary to appellees' assertions, the Appellant does not seek "maximization" of minority districts.[4] The Appellant does seek fairly drawn legislative plans in which compact, cohesive minority communities have the opportunity to elect candidates of choice in accordance with the requirements of the Voting Rights Act.

The Appellees, in their Motions to Affirm or Dismiss, cite a number of cases for the proposition that the Voting Rights Act requires far less than the maximization

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[4] In fact, the remedial plans proffered by Governor Campbell at trial provided for fewer minority districts than some of the other proposals presented. See SRAC Jurisdictional Statement at 12, 15.

of minority voting strength; however, the cases principally relied upon by appellees concern what are permissible legislative plans, not court-ordered plans which are subject to far stricter standards.

In McDaniel v. Sanchez, 452 U.S. 130 (1981), this Court noted the distinction between legislative and court ordered plans. Legislative plans are those which express the policy choices of the state. Id. at 152. See also Wise v. Lipscomb, 437 U.S. 535 (1978); Burns v. Richardson, 384 U.S. 73 (1966). As such, they are subject to preclearance under Section 5 of the Voting Rights Act, even if drawn in response to a court order. Court drawn plans, on the other hand, are not subject to preclearance, but are subject to higher standards to protect the court's credibility, as explained above. Connor v. Johnson, 402 U.S. 690 (1971); Connor v. Finch, 431 U.S. 407 (1977).

## III. The District Court Must Provide Legislative Plans Which Do Not Fragment Minority Communities Of Interest.

The issue remains as to whether a court meets its burden of racial fairness if a court drawn plan does not fully and completely eviscerate racial dilution in voting wherever it exists. It is self-evident that there are several geographically compact areas of the state in which the court failed to include in its remedy. See Governor Campbell's Jurisdictional Statement at App. 22-43. Where such failures exist, a plan cannot be deemed racially fair under Connor v. Finch, despite the court's reservation of the right of the parties to lodge a Section 2 challenge in the future.

Contrary to the assertions of the Appellees and the district court, the redistricting scheme produced by the district court not only failed to "allay suspicions," it unnecessarily created them. The court below erred by raising policies of incumbent protection[5] and county line integrity[6] to the level of the protections of the Voting Rights Act.

The Appellees allege that the court drew as many effective minority districts as could be drawn. This contention is simply insupportable in light of the alternative plans submitted by the parties. The districts drawn in the court-ordered redistricting scheme consistently minimize the size of the minority community in order to protest white incumbents. As a result, the court actually reduced

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[5] Incumbent protection is a tenuous state policy which is not embodied in any state statute or the constitution. The court below, despite its disclaimer, continued this policy by preserving core areas of prior districts and avoiding the pairing of incumbents. See SRAC Appendix 64-65. Courts have found that protection of incumbents may be an excuse for the perpetuation of discriminatory plans. See Garza v. Los Angeles County, 918 F.2d 763 (9th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 681 (1991).

[6] In one person, one vote cases, this Court has recognized preservation of county lines as a legitimate state interest if consistently applied. Mahan v. Howell, 410 U.S. 315 (1973). Such a state interest is not paramount, however. As indicated in the legislative history accompanying the 1982 amendments to Section 2, "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. No. 417, 97th Cong., 2d Sess. 29 n.117 (1982).

the ability of the minority community to elect candidates of their choice in the 21st and 40th Senate districts. [7] Can it be coincidental that the current white incumbents in these seats which the district court describes as minority seats are the Majority Leader and the President Pro Tempore of the Senate? The plans offered by the plaintiffs and the Governor demonstrate that this retrogression was unnecessary, because those plans created additional districts in which minorities would have an opportunity to elect candidates of their choice.[8]

This Court recently requested the opinion of the Solicitor General of the United States in the pending case of Figures v. Hunt, 91-1992, (October 6, 1992, order). Both Figures and the present case involve the delicate

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[7] In another court ordered district (Senate District 17 which contains 51.62% black voting age population), the candidate of choice of the minority community was defeated in the recent primary election.

[8] The lower court claims to have drawn 11 minority Senate seats; however, the court consistently failed to include adjacent minority communities in its minority districts. Four of the areas encompassed by new districts (21, 40, 36 and 32) have consistently failed to elect a candidate of the minority community's choice. In reality, the district court has only drawn seven districts where the minority community can elect a candidate of choice, not the 11 claimed by the court and the appellees. This is only one more than the current number of districts capable of electing a candidate of the minority community's choice. (The Senate claims its 1984 scheme had 10 districts capable of electing a candidate of the minority community's choice but, in fact, only six are actually capable of electing a candidate of the minority community's choice because they also fragment the minority community in the same four districts.)

situation created when a state avoids Section 5 preclearance by having a court impose a remedial plan.

In fact, the redistricting scheme involved in the case at bar is more egregious than the plan in Figures and is factually distinguishable from Figures on that basis. Moreover, the parties in Figures stipulated the 1990 census and the circumstances in Alabama required the creation of one minority district of 65 percent minority population or more. Late in the trial, the appellees in Figures submitted a two-minority district plan with 59.33 percent and 61.98 percent in minority population. The trial court honored the stipulation and ordered a single district plan with a district of 65 percent.

In South Carolina, no such stipulation was made. The plaintiffs provided ample evidence that minority voting strength was being diluted by fragmenting minority communities of interest in an effort to protect white incumbents. In this effort, the district court went so far as to retrogress unnecessarily two Senate districts which have almost enough black voting strength to elect candidates of the minority community's choice; the court's configuration has the effect of protecting key white incumbents.

## IV. The Issues Presented Are Not Moot.

The issues presented in this case are not mooted by the passage of time nor are they made less substantial because of its nature as a remedial order. As was evident during the trial of this case, the use of highly sophisticated, computer-generated district maps also produces illustrative data to demonstrate the outcome of past races in proposed districts. The ability to consider this type of data is particularly useful in determining the potential impact of

racial bloc voting on proposed districts. The claim that minority groups cannot challenge a discriminatory electoral system because no election has been conducted is both logically fallacious and legally insupportable. In fact, in every remedial proceeding, courts must evaluate the legal sufficiency of proposed plans before a court-ordered plan is tested in an election. See SRAC Brief Opposing Motions to Dismiss or Affirm at 1-5.

## V. Conclusion.

Based on the foregoing, the Court should note probable jurisdiction.

Respectfully submitted,

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## FILING AND MAILING CERTIFICATE

I hereby certify that on this 3rd day of November, 1992, I filed 40 copies of a Brief Opposing Motions to Dismiss or Affirm with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail this same date from Richmond, Virginia the required copies to opposing counsel.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

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